PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 607

THE DAILY PRESS, INC.,
Petitioner,

vs.

UNITED PRESS INTERNATIONAL,
THE EVENING NEWS ASSOCIATION
and
KNIGHT NEWSPAPERS, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

EUGENE DRIKER
Counsel for Petitioner
900 Michigan Building
Detroit, Michigan 48226

Of Counsel:
ERWIN C. ZIEGELMAN
600 Ford Building
Detroit, Michigan 48226

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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The Brief of Respondent United Press International in Opposition to the Petition for Writ of Certiorari contains a number of major misstatements of fact which require reply by petitioner.

1. At pages 5-7 of its Brief, respondent UPI intimates that petitioner had a period of approximately two years from April 1,. 1966, in which to complete discovery previously sought by petitioner. This is incorrect. At a pre-

trial conference held in chambers on November 29, 1965, the trial court ordered that all discovery be completed by April 1, 1966. No order was thereafter entered modifying this limitation on discovery.

Prior to the hearing on interrogatory objections held on February 6, 1967, petitioner indicated to the court and respondents that petitioner, pursuant to instructions by the trial court, had reviewed the interrogatories and that it was prepared to withdraw a substantial number thereof. Petitioner further indicated (as it had every right to so do) that it required answers to the remaining interrogatories in order properly to respond to the motions for summary judgment.

At the hearing on February 6, 1967, the district court discussed the interrogatories in general, indicating that some were objectionable and others perhaps so. Still others were not mentioned at all. No order was ever entered disposing of petitioner's motion to compel answers nor to respondents' objections. Petitioner was instructed to and did file its Brief in Opposition to Defendants' Motions for Summary Judgment on April 13, 1967, without benefit of the discovery which, as late as February 6, 1967, it had urged the court to permit. In its Brief in Opposition, petitioner continued to state its need for further discovery.

2. At footnote 6, page 5 of its Brief, respondent UPI wrenches out of context a statement made by counsel for petitioner at the court hearing on February 6, 1967, and seeks to convey the impression that petitioner conceded that further discovery was unnecessary. A full reading of that transcript shows that petitioner repeatedly took the position that the requested discovery was necessary in order to intelligently oppose the motions for summary

judgment. Indeed, petitioner's Brief in Opposition to Defendants' Motions for Summary Judgment (and supporting affidavit of counsel) clearly spelled out petitioner's need to complete discovery—a position consistently maintained by petitioner throughout the case.

3. At pages 4 and 5 of its Brief, respondent UPI seeks to convey the impression that discovery carried on by petitioner was inordinate and unwarranted. In no manner was the discovery by petitioner in this action burdensome or unwarranted. In fact, petitioner took the depositions of only two officials of UPI, two of Evening News and one of Knight Newspapers. The entire time taken by these depositions was about eight hours. Petitioner also obtained copies of documents from respondents, numbering about 200 from UPI and 33 and 24 from the News and Free Press, respectively. Rather than producing documents both "relevant and irrelevant" (UPI Brief in Opposition, p. 4), UPI deleted from the documents it produced all information regarding the rates which it charged customers, including those customers which UPI served on a *short term basis during newspaper strikes.* Petitioner, by affidavit, pointed out to the district court (and later to the court of appeals) that, based upon personal knowledge of counsel, the undisclosed rate information was critical to petitioner's case. Neither court considered this unchallanged statement.

4. At page 15, footnote 13, respondent UPI makes reference to the refusal of UPI to sell photographic portraits of President John F. Kennedy, Chief Justice Warren, and Lee Oswald to petitioner for use in publication of the Warren Commission Report. Respondent correctly reflects the record in stating that UPI does not sell "spot news pictures" on an "a la carte" basis. What respondent fails to point out, however, is that the testimony of UPI's president makes it clear that the portraits petitioner sought to

buy (two of which were of persons who had been dead many months) were *not* "spot news pictures", but feature pictures which *anyone* (except petitioner) was able to buy from UPI. See 319a-322a. UPI's president testified that "spot news pictures are pictures where time is of the essence". By distinction, portraits of famous people are "feature pictures" that were sold by the UPI to anyone —except, of course, petitioner (322a).

5. Most amazing is UPI's attempt to turn black into white by stating that petitioner represented to UPI that it was publishing an afternoon paper. (UPI Brief in Opposition, page 16, footnote 14). The record references to this remarkable statement in no manner support it. The Daily Press was conceived and published only as a morning newspaper (274a). This fact becomes significant, of course, in judging the validity of UPI's contention that it offered to deal with petitioner on the same terms it dealt with Detroit's other morning newspaper—the Free Press. In fact, the Free Press was paying $961.78 weekly for UPI service and, although petitioner offered to pay $3000.00 per week for *fewer* services, UPI refused to deal. No slight of hand with the record can alter those uncontroverted facts.

6. At page 18, footnote 17, of UPI's Brief in Opposition, reference is made to the lengthy affidavit of Professor Michael Rieber submitted on behalf of plaintiff in opposition to the motions for summary judgment. Respondent states that the affidavit was "not filed," and that it does not comply with Rule 56(e). Neither statement is correct. The affidavit was indeed filed on April 13, 1967, as part of petitioner's Brief and Appendix in Opposition to Defendants' Motions for Summary Judgment. The affidavit does not separately appear on the list of docket entries because it was part of an entire bound volume of documents filed directly with the district judge, as permitted by Rule

5(e). Evidently, the district judge's clerk failed to have the documents entered on the docket, but those documents have been a part of the record in this case in the district court, in the court of appeals and in this Court.

Respondent UPI does not set forth reasons for its claim that Professor Rieber's affidavit fails to conform to Rule 56(e). In fact, the affidavit satisfies all requirements of that rule and should have been (but never was) considered by the courts below.

CONCLUSION

In view of UPI's emphasis on the nature of the proceedings below, we believe it important again to point out that petitioner was never given its day in court, nor was it ever permitted to fully and fairly present its case. It was compelled to oppose complex motions for summary judgment without having the benefit of discovery to which it was entitled, nor, indeed, the benefit of having a ruling from the court on its discovery request. Its complaint was dismissed without a hearing ever being held on the summary judgment motions, although the trial court had assured counsel that the court would grant "a substantial amount of time to such a hearing." (Transcript of Hearing of February 6, 1967, page 27).

Petitioner requests that the relief prayed for in its petition be granted.

Respectfully submitted,

EUGENE DRIKER
Counsel for Petitioner

ERWIN C. ZIEGELMAN
Of Counsel

December 1969.